



# Office of Command Counsel Newsletter

August 1997, Volume 97-4

## CLE Resounding Success!

**T**he 1997 AMC Continuing Legal Education Program was held in Alexandria, Virginia 16-20 June. By any measure the Program was very successful with nearly 150 attorneys from AMC, DA and several other federal agencies, enjoying a series of plenary sessions, nearly two-dozen electives, and four-

hour sessions devoted to environmental, intellectual property, employment and acquisition law.

This year's theme of "AMC Attorneys: Teaming for Success" recognizes that to be successful, to actively participate in the AMC mission, we must Team, not just within the legal community, but with our clients and customers.

My thanks to **Steve Klatsky** who chaired the CLE Planning Committee, and his committee comprised of **Colonel Bill Adams, Dick Couch, Bill Medsger** and **Elizabeth Buchanan**. A special thanks to **Tom Cavey** for ensuring a smooth, organized, trouble-free meeting, and to **Holly Saunders** and **Debbie Arnold** for their valuable admin. assistance. ©

## Allen Receives Attorney of the Year Award

**A**s part of the AMC Command Counsel's Award Program, this year's nominees for the Joyce I. Allen Attorney of the Year Award were **Fred Allen**, MICOM; **Tim Connelly**, ARL; **MAJ Susan Gibson**, TECOM; **LTC Phil Lower**, CBDCOM; **Bob Parise**, TACOM-ARDEC; **John Seeck**, IOC; and **Tony Vollers**, ATCOM.

The recipient is **Fred Allen**, Acting Chief, Acquisition Law Division, MICOM.

Mr. Allen has been a valued member of the MICOM legal staff for 29 years, working in every phase of the acquisition process. He has been involved in the develop-

ment and fielding of some of the most important weapon systems, including the Pershing II and Multiple Launch Rocket System, and spearheaded the development of the first NATO Project Office — the NATO Medium Extended Air Defense System Management Agency.

Surveys of the MICOM workforce indicate that under Mr. Allen's management, the Acquisition Law Division enjoys a tremendous reputation from both clients and customers. Congratulations to each nominee and to **Fred Allen**.

More details on the Command Counsel's Award Program can be found on page 4.

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# Letters to the Editor

## Frequent Flyer Follow-up

Dear Editor:

In the June 1997 AMC Command Counsel Newsletter was printed a Letter to the Editor from John Stone, SSCOM concerning cash awards to employees enrolled in the frequent flyer program. I couldn't agree with Mr. Stone more on this subject. The gainsharing program could be a wonderful opportunity to encourage the use of the frequent flyer program (with its huge potential for cost savings).

When we first asked DA whether this program could be pursued, OGC opined that it could not, because such a program does not fall under the categories of awards con-

templated by the Government Employees' Incentive Awards Act. Later, we became aware of several things that we thought might effect DA's opinion. First, I verified that GSA has, indeed, an active gain sharing program up and running. I was even provided a copy of that program. Next, my boss brought to my attention an article published in the May 12, 1997 Federal Traveler Magazine, which praised the GSA gainsharing program and claimed that GSA had saved \$120,000 since 1995 through the program.

This office forwarded all of this information to DA, asking that another review be  
*continued on page 13, column 1.....*

## List of Enclosures

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Back Issues are available by contacting the Editor at (703) 617-2304.

Contributions are encouraged. Please send them electronically as a Microsoft® Word® file to [sklatsky@hqamc.army.mil](mailto:sklatsky@hqamc.army.mil)

Check out the Newsletter on the Web at [http://amc.citi.net/amc/command\\_counsel/](http://amc.citi.net/amc/command_counsel/)

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

pecial edition

# CLE Goes to Washington

## The Supreme Court Through the Eyes of the Clerk

One of this year's CLE Program highlights was the group tour of the Supreme Court, specially arranged for and administered by **MG (Ret) William K. Suter**, Clerk of the U.S. Supreme Court.

**MG Suter** spoke to us from within the Courtroom, with attendees in awe of the setting. The 60-minute discussion was filled with inside stories, anecdotes

and historical references. We can not thank **MG Suter** enough for taking time to be our personal tour guide.

For an attorney there is no more impressive venue.

## Washington After Dark

Some 75 attendees and their families enjoyed a 3-hour guided bus tour to many Washington, D.C. landmarks — the Vietnam and Korean War Memorials; the Lincoln, Jefferson and F.D.R. Memorials; and the Iwo Jima Memorial.

The tour put in perspective the important work we do for the U.S. Army, soldiers and civilians alike.

For most of us it was our first visit to the new FDR Memorial - an extremely impressive park-like setting that honors the former President and Eleanor Roosevelt. And, we lucked out with a beautiful June evening over the Nation's Capitol.

When in Washington please take the time to visit these historic places.

# CG Speaks at Preventive Law Program 1997 AMC Award to Esparraguera Command Counsel's Award Program

A highlight of our annual CLE Program is the Command Counsel's Award Program, a time to reflect back on this year's critical individual and team achievements, and to recognize those counsel whose professionalism and exceptional work products contributed significantly to the success of AMC.

This year, our Commander, **General Johnnie E. Wilson** participated in our Awards Program, and provided attendees with an update on developments within the Command, DA and DOD.

**General Wilson** conveyed his appreciation for the significant contribution that AMC attorneys and support personnel make to accomplish the AMC mission, and encouraged our active participation as part of the AMC "Board of Directors".

This award recognizes efforts that encourage each AMC attorney to anticipate the needs of client and commands, to identify areas of greatest vulnerability and to develop programs to address those needs.

Nominees for this year's award were **Emanuel Coleman**, MICOM; **Bradley Crosson**, IOC; **Hal Dilworth**, MICOM; **Rita Edy**, MICOM; **Maria Esparraguera**, CECOM; **Margaret Gillen**, CECOM; **John Klecha**, TACOM; **Jeanne Rapley**, TECOM; **Marcia Stevens**, MICOM; and **CPT Christopher Wood**, ATCOM.

**Maria Esparraguera** is this year's awardee.

**Ms. Esparraguera** is primary counsel for the Base Realignment and Closure construction contracts at CECOM. Maria designed Partnering Agreements to ensure that Ft. Monmouth personnel and the construction contractors developed a relationship based on open and honest communication, early identification of potential problems, face-to-face discussions, and a mutual commitment to resolve issues without resort to litigation. **Ms. Esparraguera's** skillful, dedicated and proactive approach greatly contributed to the overwhelming success of the BRAC projects.

## Command Counsel's Editors Award

In the fourth year of this award, **CPT Joe Edgell**, HQ, AMC, became the first individual to be recognized for his significant contribution to our Newsletter. (Previously, AMC legal offices were recipients). **CPT Edgell** has been the driving force behind automation of the Newsletter, which has made the Newslet-

ter available quicker and to a wider audience, with a much more attractive design. Thanks to **CPT Joe Edgell** for his tireless efforts to bring the AMC legal community closer towards the 21st century. **CPT Edgell** leaves us with the huge task of maintaining his standards!

## LOGCAP Performance Earns CECOM Accolade for Teamwork

The Team Project Award recognizes exceptional contributions by groups or teams working together on a project or program.

This year's nominees were the ARL Alternative Dispute Resolution Project Team chaired by **Sam Shelton**; ATCOM's Legal, CPO, EEO Team with **Bob Garfield** representing legal; LOGCAP Legal Team, comprised of CECOM and AMC attorneys managed by **Kathi Szymanski**; SSCOM's Command Legal Program Team, **John Stone, Maria McDermott, Peter Tuttle, Jessica Niro, James Savage, Vince Ranussi** and **Richard Mobley**; TACOM's Automation Team, **John Klecha,**

**Frank Rodriguez, Barry Dean** and **Pat Jacques**; TACOM's Tech Transfer License Team, **Marty Kane, Ed Goldberg, Michael Sachs** and HQ AMC's **Ed Stolarun**; and, TECOM's Team Legal, **Laura Haug, MAJ Susan Gibson,** and **SFC Monique Wagner**. The recipient of this year's Team Project Award is the LOGCAP Legal Team .

The team is comprised of **Kathi Szymanski, Mark Sagan, Paula Pennypacker, Vince Buonocore, Howard Bookman,** and **Kim Melton** from CECOM, and **Jeff Kessler** and **LTC Paul Hoburg** from HQ AMC.

LOGCAP is the Logistics Civil Augmentation Program, a DA initiative to preplan dur-

ing peace time for the use of civilian contractor personnel to perform selected services and other contingencies to augment U.S. forces in support of DOD missions.

CECOM was selected to serve as the Contracting Agency, quickly moving to form a team with pre-award and contract administration expertise.

Teamwork was an essential reason why the contract for this high-visibility, high-dollar value contract was awarded 125 days from issuance of the solicitation.

After award 3 of the 4 unsuccessful offerors praised CECOM for its professionalism throughout the process. No protest litigation was filed in connection with this extremely complex acquisition.

## Buckley Managerial Excellence Award

Named for the late Chief Counsel of MICOM, the Francis J. Buckley Jr. Managerial Excellence Award emphasizes the importance of quality management to the AMC legal system.

This year's nominees were **Don Hankins**, MICOM; **Laura Haug**, TECOM; **Bruce Jones**, ATCOM; **Kay Krewer**, TACOM-ACALA; and, **Mark Sagan**, CECOM.

This year's recipient is **Bruce Jones**, ATCOM.

As Chief of Branch A in the ATCOM Procurement Law Division, **Mr. Jones** ably handled the tremendous challenges of the departure of two experienced attorneys by reorganizing his Branch, cross-training, and mentoring counsel on the important work done by his organization.

Branch A supports the development of the Commanche and Longbow Apache helicopter, two of the most visible, costly and vital weapons systems programs.

The common thread to the success of Branch A is the ability of **Bruce Jones** to convince clients, peers, and subordinates that doing the right thing will, in fact, yield the best results.

## Achievement Award

The Command Counsel's Achievement Award is unique in that HQ AMC attorneys nominate field attorneys who have achieved extraordinary achievement on a significant case or project.

This year's recipient is **CPT Harry Hamilton** from CECOM. As part of AMC's highly regarded Environmental Law Specialist community, **CPT Hamilton** expertly handled a number of very significant legal and practical matters pertaining to the National Environmental Policy Act (NEPA) review process and for the complex issue of radioactive sources.

Regarding NEPA, **CPT Hamilton** was instrumental in pursuing completion of the Ft. Monmouth-Evans subpost Environmental Impact Statement, a 500 page document, analyzing and interpreting many complex issues, satisfying the concerns of lawyers and program personnel at AMC and DA.

Concerning radioactive sources, **CPT Hamilton** successfully counseled his clients regarding the interface between NEPA and the Nuclear Regulatory Commission process, and coordinated an agreed upon approach and ultimate approval by HQ DA.

## Outsourcing and Privatization Panel

HQ AMC's **Elizabeth Buchanan** chaired a panel on this timely and vital subject, and CLE attendees actively participated in presentations by **David Childs**, Program Examiner, Office of Management and Budget and **COL Henry Leonard**, Director of Outsourcing and Privatization, Office of ACS for Installation Management, Department of the Army.

Current governmental DA and AMC efforts were discussed, as well as legal issues that are being raised.

Outsourcing is defined as a transfer of function which had been performed by Government employees to performance by contractor employees (Example: A-76 studies and depot maintenance competition).

Privatization is the process of changing a public entity to private control and ownership (Example: divesting utilities and housing).

As we look to the future to meet the expectations of the Administration and DOD no subject will be as important to us as the related disciplines of outsourcing, privatization and the A-76 contracting out process. Teamwork will be essential in order to succeed.

## Edgell Smashes a Pinch Hit Homerun!

With the unexpected cancellation of one of our plenary speakers, we called upon **CPT Joe Edgell** to demonstrate the AMC Web Site and to provide conferees' with "basic training" on the Internet, a difficult task to accomplish for an audience of 150. With less than 24-hours notice, **CPT Edgell** planned and executed an exceptional presentation for attendees, during which Joe created a spirited dialogue by his excellent teaching methods.

General Wilson recognized this highly professional effort by issuing **CPT Edgell** an AMC coin.

## And Thanks To All Of You ...

To each of you who prepared a presentation, assisted invited guests, and made our field counsel feel at home, a heartfelt thanks. You practiced well the theme of this year's program — Teaming for Success".

Your work and planning for the implementation of the Annual CLE Program is not a substitute for the outstanding work you do for our client on a daily basis; it is a vital "extra duty" which brings us closer together as a lawfirm and community.

# Acquisition Law Focus

## Try It: ADR at Revisiting Oral GAO Presentations: FAR 15

HQ AMC Protest Counsel **Jeff Kessler**, DSN 767-8045, reports on his successful use of Alternative Dispute Resolution (ADR) techniques on bid protest cases (Encl 1).

Three specific examples are cited, with an ADR Conference approach used to expedite raising issues, discussion and resolution. GAO attorneys were made available and fully supported these efforts at early resolution.

While not a panacea for all cases, ADR for bid protest cases should always be considered. Coupled with our AMC-Level Protest Program, ADR at GAO provides another vehicle for reaching agreement.

## FMS Contingent Fees--A Change?

HQ AMC International Law counsel **Larry Anderson**, DSN 767-1040, has written an excellent memorandum, outlining the changes with respect to contingent fees in federal government contracts. The Director of Defense Procurement issued an interim rule on 17 January to eliminate the requirement for a government review

CECOM's **Tom Carroll**, DSN 992-9805, has prepared a treatise highlighting the Federal Acquisition Regulation (FAR) Council rewrite of FAR Part 15, Contracting by Negotiation. A history of the issue from the first version published in September 1996 to the May 14, 1997 proposed rule is included.

Subpart 15.1 entitled "Source Selection Processes and Techniques and 15.103 addresses "Oral Presentations" which will provide specific regulatory guidance for the first time.

This new FAR section allows oral presentations to be used as an information gathering tool at any time in the

of a prospective contractor's contingent fee arrangement for FMS contracts.

An amendment in June proposes to eliminate the current \$50,000 ceiling on contingent fees, permitting fees in excess of this amount when the foreign customer approves the payment in writing before the contract award (Encl 3).

acquisition process; describes what types of information may be suitable for gathering through an oral presentation; what types of information must be obtained in writing; provides some criteria to consider in deciding exactly what information to obtain through an oral presentation in any particular acquisition; describes what instructions should be included in the solicitation if oral presentations by offerors are to be required; and, requires that the contract file include a record of the oral presentation with the method and level of detail left to the discretion of the source selection authority. A great paper (Encl 5).

## Definitizations Explained

After reading that title a second time, you are invited to read the article by AMCOM's **Diane Beam** article. She describes the statutory requirements of UCAs contained in 10 USC e 2326, highlights requirements, addresses restrictions and defines "qualifying proposals." The technical issue of timeliness under the 180 day or 50% rule contained in the statute and at DFARS 217.7404-3(a) is also addressed (Encl 2 ).

# Acquisition Law Focus

## Signing A Non-Disclosure Agreement

SSCOM's **Vin Ranucci**, DSN 256-4510, provides an interesting paper addressing the circumstances of a non-federal party submitting an item to an Army facility for test and evaluation. The submitter general includes a non-disclosure agreement (NDA) raising the question whether the Army should sign.

DA policy suggests that it should not be signed by Army representatives unless the item is very important to the Army and the submitter insists. In this case, a contracting officer is deemed to be the only appropriate Army official to sign (Encl 4). Your attention is invited to JALS-IP guidance dated 16 November 1992.

## AMC Partnering Guide and Videotape

The Guide and Videotape are now available. As Acquisition Law Counsel have you informed your clients in the Acquisition Centers and Directorates of the availability of these critical program tools?

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## Bundlin' Ain't Bumblin'

ACALA's **Joe Picchiotti**, DSN 793-8435, provides a paper outlining GAO cases upholding the agency decision to bundle: procurements that combine separate, multiple requirements into one contract. And, a case in which an agencies decision was not supported at GAO. In the latter case, GAO determined that when concerns of administrative convenience are being weighed against ensuring full and open competition, CICA, 41 USC 253, and implementing regulations require that the scales be tipped in favor of ensuring full and open competition (Encl 6).

## Who's Who in AMC: See the Defense News

The Summer 1997 edition of the Defense News has a fine supplement on the Army Materiel Command, highlighting missions, values, and the people who comprise our Command. When your non-AMC clients and customers ask you who we are, this would be a great method of educating them.

## Balance of Power at the Court

The Supreme Court is often measured by its 5 to 4 decisions, 17 this term **Justice Anthony M. Kennedy** was in the majority in 14 of these cases, more than any other justice. Overall, Kennedy stood with the majority 94 percent of the time. **Justice Sandra Day O'Connor** was in the majority in 12 of these cases and, overall, in the majority 89 percent of the time.

Although in recent terms **Kennedy** and **O'Connor** played the center more, signing on with liberal leaning justices in some key cases, this term they were more inclined to be with the three most conservative members of the bench: **Chief Justice William H. Rehnquist** and **Justices Antonin Scalia** and **Clarence Thomas**. This quintet voted together in eight cases. No other five justice combination prevailed nearly as much.

The dissenting block most often includes **Justice John Paul Stevens**, **David H. Souter**, **Ruth Bader Ginsburg** and **Stephen G. Breyer**, with **Stevens** being the greatest dissenter.

The two Supreme Court Justices who voted together most often were **Scalia** and **Thomas** — in all but one case.

# Environmental Law Focus

## EPA Military Munitions Rule Information & Status Report

**Stan Citron**, HQ AMC ELS continues to provide exceptional representation for implementation of the munitions rule. Highlights of recent developments are summarized:

**MR Effective Date** - The EPA Military Munitions Rule (MR) was published several months ago with an effective date of 12 August 1997. Despite the "effective" date established by EPA, the MR will not take effect in most states until it is formally adopted through the state administrative rulemaking process

**MR Implementation** - Over the past four months the military services have met with the states to discuss implementation of the MR. Many of the states support the MR but most states will not be able to complete the administrative process to adopt the MR by the 12 August 1997 deadline

### ELD Summer Bulletins

ELD Bulletins for June and July 97 are provided (Enclosures 7 and 8) for those who have not yet signed up for or do not have access to the LAAWS Environmental Forum or have not received an electronic version.

### What should installations do after 12 August 97?

If the state accepts the MR, the installation should implement the rule on 12 August 97. On the other hand, if the state does not accept the MR and has not proposed alternative rules, the installations should maintain the status quo regarding munitions operations until the state's concerns are adequately addressed.

**Conclusion** - The successful implementation of the MR will require communication within all levels of AMC. Any questions regarding the MR may be addressed to the AMC DSC for Ammunition **Oscar Guarnstrom**, DSN 767-9799, the AMC Environmental Office **Don Gower**, DSN 767-9571, or the AMC Legal Office, **Stan Citron**, DSN 767-8043

### Edgell to Ft. Stewart

CPT Joe Edgell has been reassigned to Ft. Stewart after more than two years of outstanding work for the Army Materiel Command. Best wishes to Joe for a successful tour as a Trial Defense Counsel. Luckily, Georgia has liberal bike riding laws.

## CEQ NEPA Impact Analysis

**Major Allison Polchek** has prepared an excellent outline on the National Environmental Policy Act (NEPA), enclosure 11. One area of NEPA analysis that is getting increasing emphasis by the courts and interest groups is the requirement to assess the cumulative impact of an action in relation to other past, present, and reasonably foreseeable future actions in the area. The Council on Environmental Quality has put together an extensive reference guide, which is available on its Web site as well as a wealth of other important aid for writing and reviewing NEPA documents.

## New AMC ELS and Real Estate Team

**Major Michael (Mike) Stump** joined HQ AMC and the Environmental Law Team on 1 July 1997. His arrival presented an opportune time to reassign the responsibilities of our Team members with respect to both which BRAC installations they will be responsible for, and the general environmental functional areas of responsibilities. The BRAC Installation Responsibilities are at enclosure 9 and environmental team functional areas at enclosure 10.

# Environmental Law Focus

## Suitability to Lease or Transfer Army Real Estate

The new AR 200-1, Environmental Protection and Enhancement, 21 Feb 1997, paragraph 15-6 now requires a Finding of Suitability to Lease (FOSL) for leases and a Finding of Suitability to Transfer (FOST) for Army leases or sales divesting title. Previously these documents were only required for real estate transactions at BRAC sites. Details of any differences between procedures at BRAC sites versus transactions at active bases will be provided in DA PAM 200-1, soon to be published. In light of this expansion of the FOST/FOSL process AMCCC-G in conjunction with the AMC Environmental Quality Divi-

sion is in the process of developing a comprehensive guide and representative model to use. It will be distributed to environmental law specialists, as well as located on our Command Counsel WWW Home Page. DoD has recently published an extensive revision of its FAST TRACK TO FOST guidance as well as a FOSL Factsheet and Guide. These should be consulted by anyone involved in the process or writing, reviewing either a FOST or FOSL. If you cannot obtain a copy from the Web Site, contact **Bob Lingo**, DSN 767-8082 or **Stan Citron**, DSN 767-8043 in our office.

## Bumper Cars on Government Time

ARL Paralegal Specialist **Angee Acton**, DSN 767-1072, prepared an ARL Chief Counsel Comment on an all too common occurrence. This interesting paper addresses POV's, rental vehicles, and the relationship between private insurance and the Federal Employee Compensation

Act (FECA). You are reminded that you are acting "outside the scope of employment," for example, when traveling beyond a reasonable distance from the location of the Government business. In such cases, the employee may not be covered by the Federal Government in the event of an accident (Encl 16).

## Surfing for BRAC and Environmental Websites

There is a **Wealth** of information out there if one only knows where to work. In relation to that statement, enclosed is a list of BRAC sites which have information of the BRAC real estate transfer and environmental process (Enclosure 12). Similarly, we have put together a list of sites that emphasize environmental law and issues as it relates to the acquisition process. Enclosure . A copy of the final Air Force Affirmative Procure Guide, mentioned at our Continuing Legal Education Conference, can be obtained through contacting the site for the Air Force Center for Environmental Excellence, contained on the list.

### 1997 CLE Critiques

Appreciate the some 75 CLE attendees who took the time to make important comments about program content and administration. Our planning committee will incorporate them for our 1998 CLE Program.

# Employment Law Focus

## Affirmative Action at the High Court

The Supreme Court has agreed to rule on the legality of a workplace affirmative action plan and decide whether a New Jersey school board lawfully used race in deciding to lay off a white teacher. The case of the Board of Education of Piscataway, N.J. v. Taxman, US Sup Ct No. 96-679, June 27, 1997, involves an affirmative action plan adopted by the school board, not to remedy past discrimination, but as a voluntary effort to promote racial diversity.

In 1989, the school board had to lay off a teacher from its high school business department. Two teachers, one white and one black, had been hired the same day and had the same qualifications. The white teacher sued after the layoff claiming a violation of the Civil Rights Act of 1964. The Third Circuit agreed that reverse discrimination occurred. The decision by the Court will likely be as important to layoff cases as Adarand Constructors, Inc. v. Peña 515 U.S. 200 (1995) is to government contracting.

## Sometimes You Can Lie!

The Supreme Court will review whether federal employees can be disciplined for making false statements to agency investigators in addition to being disciplined for the underlying misconduct for which they are being questioned or investigated.

The case of King v. Erickson, US Sup Ct, No. 96-1395, June 22, 1997, and others such as Walsh v. VA, 62 MSPR 586 (1994), decided by the MSPB and sustained by the US Court of Appeals for the Federal Circuit, established that an employee cannot be disciplined for the mere act of denying an alleged act of misconduct, but could face discipline for "telling a story" to agency investigators.

At the CLE Program, Anniston's **George Worman** and **Susan Bennett** gave a very well-received elective on this important employment law issue.

## Labor-Management Partnership

Let us know of your success stories, experiences and recommendations on improving communication during this time of personnel turbulence.

## Labor Management Pre-decisional Problem -Solving

The Federal Labor Relations Authority (FLRA) issued a guidance memorandum on July 15, Subject: Pre-Decisional Involvement: A Team-Based Approach Utilizing Interest-Based Problem Solving Principles.

FLRA **General Counsel Joe Swerdzewski** believes that pre-decisional involvement is the cornerstone of labor-management partnership. This term represents those activities where employees through their union representatives are afforded by agency management the opportunity to shape decisions in the workplace which impact on the work the employees perform. This does not waive management rights or the right to bargain collectively, and it does not expand the scope of bargaining.

Pre-decisional means that the parties work together to design and implement comprehensive workplace changes. Under this doctrine workplace participants have input into the decision-making process, allowing them to present and explore solutions that may not have otherwise been discussed. The FLRA OGC's Executive Summary is provided (Encl 13).

# Employment Law Focus

## What You Tell Future Employers May Be Your One Big Regret

The U.S. Court of Appeals for the Ninth Circuit in Hashimoto v. Dalton, CA 9, No. 95-15827, July 3, 1997, ruled that advising a prospective employer that the applicant met with an EEO counselor is a prohibited act of discrimination (retaliation) for engaging in protective activity (the right to consult with a counselor). The supervisor's act would have a chilling effect on other employees who might wish to consult with an EEO counselor.

## Sexual Harassment: A Quid Pro Quo Refresher

A good case to refresh yourself on several important sexual harassment issues is Hunter v. Air Force, 1997 U.S. App. LEXIS 15256, a Federal Circuit decision that addresses the correct burden of proof (preponderance of the evidence), the requirement for corroborating evidence (none needed), and credibility (an Administrative Judge responsibility not often disturbed on appeal), and discipline of supervisor (held to higher standard of care).

## DA Issues CPOC-EEO Complaint Processing Policy

The DA issued guidance on July 7, addressing the procedures to be followed in processing EEO complaints of discrimination involving actions by the Civilian Personnel Operations Center (CPOC).

When the CPOC is processing actions for a serviced installation or activity it is in the "acting for" capacity for that installation or activity commander/director. As such, the CPOC is working for the commander/director of the activity who requested the personnel action. Under this guiding principle, although geographically separated, the CPOC can be looked upon as part of the serviced commander's/director's staff when processing personnel actions for that commander's/director's installation or activity.

When a CPOC is acting for a serviced commander/director and an employee or applicant alleges discrimination which involves an action taken by the CPOC, the EEO Office servicing the commander/director is responsible for counseling and complaint processing. For example:

(a) If a Fort Bragg employee applies for a position at Fort Bragg and alleges that Southeast CPOC personnel at Fort Benning discriminated based on sex in non referral for the position, the Fort Bragg EEO Office is responsible for counseling and complaint processing.

(b) If a Fort Bragg employee applies for a position at Fort Polk and alleges that South Central CPOC personnel discriminated based on sex in non-referral for the position, the Fort Polk EEO Office is responsible for counseling and complaint processing.

Additionally, the guidance ensures that the labor counselor, EEO manager and CPO work as a team for issues such as access to records, settlement, and other related issues (Encl 17).

## Planning for January 1998

It's not too early to put the Annual OPM Symposium on employee and Labor Relations (SOELR) on your training calendar. The most comprehensive employment law and policy program for you.

## Downsizing Impacts Union Representation

OPM reports that the number of federal employees represented by unions has dropped sharply the past five years — 13% between 1992 - 1997. DoD unions show the biggest decrease as a result of BRAC and other downsizing. Some figures: Metal Trade Council dropped by 56%; International Association of Machinists and Aerospace Workers declined by 22%; National Federation of Federal Employees declined 16%; National Association of Government Employees dropped 17%; and, the

American Federation of Government Employees by 10%.

In terms of numbers of employee represented by unions, the Army, Navy and Air Force rank second, third and fifth, respectively, of the 65 Federal agencies surveyed.

Based on the latest OPM data, Army has 448 bargaining units covering 135,679 appropriated fund employees (about 59% of our work force.), 36,373 are blue collar and 99,306 are white collar. 394 units (128,672 employees) are covered by collective bargaining agreements.

...Letter to the Editor continued done to see if DA's opinion was now different. OGC responded that its opinion had not changed and that the Government Employees Incentive Awards Act does not authorize such an award program. Further, OGC added a new justification for not authorizing such a program - that is, the interest of maintaining uniformity between civilian employees and soldiers since 10 USC

*continued on page 15, column 3.....*

## Off Duty Rape May Not Create A Hostile Work Environment

Unique Facts Lead to Strange Conclusion

A Treasury employee was not subjected to a hostile work environment when she was raped by a colleague during off-duty. In the case of Temparali v. Rubin, DC EPA, No. 96-5382, June 19, 1997, the Court decision emphasized that the victim failed to file a discrimination claim within 45 days of the incident, waiting 158 days and offering no excuse for the delay. The Court also concluded that the agency was not liable absent a showing of actual or constructive of the accused's poor past behavior. An important fact in the case is that the two parties work thousands of miles from each other. ©

## FMCS Arbitration Fee Schedule Rules Issued

The Federal Mediation and Conciliation Service (FMCS) issued substantially revised rules on June 25 (see Federal Register 62 FR 34170), the first revision in 18 years.

New deadlines are imposed upon both the parties and arbitrators. For the first time participating parties and

arbitrators will be required to pay for FMCS services. For example, FMCS will assess a \$30 fee for each request for a panel of arbitrators; will be assessed \$100 for an annual FMCS listing; and, will impose a \$10 fee (plus 10 cents a page) for a list and biographical resumes for all arbitrators in a designated geographical area. ©

## Ethics Focus

### Frequently Asked Questions on Frequent Flyer Miles

HQ, AMC's **Mike Wentink**, DSN 767-8003, has prepared a very informative paper on this complex issue. While the rules may not be intuitive or logical, Mike Wentink's paper is both.

In short, mileage points received from an airline for traveling TDY on its aircraft belong to the government — and there are no exceptions. After this hard and fast rule, the fun begins when you speak about airline upgrades, bumping, and credit cards.

The rules regarding credit cards are particularly tricky. For example, if you have a VISA card that is affiliated with United Airlines, and if you buy a \$500 ticket for a TDY flight on United Airlines, you receive 500 miles from VISA credited to your United Airlines account. Those 500 miles belong to you. However, the 2,000 miles that are credited to your account for the miles you fly on that ticket belong to the government. (Encl 14 ).

August 1997

### Trinkets From Abroad

Many of us deal with representatives of foreign governments. These representatives often offer gifts to those they visit, or who visit them. The situation is usually such that it is almost impossible to refuse or return the gifts. So, what to do? Can you keep

these gifts? Like most things, it depends.

The Constitution says that we may not accept such gifts, at least not without the permission of Congress. Congress authorizes us to accept gifts of "minimal value" which is currently defined as not exceeding \$245 retail value in the United States.

If the gift exceeds "minimal value" then your acceptance is on behalf of the United States Government. You must turn it in (to an office in PERSCOM), although you may indicate your wish to purchase the item from the United States.

Enclosed is an information paper that explains the rules (Encl 15). AMC Regulation 600-29 that prescribed procedures for the handling of such gifts in AMC has been rescinded. If you have any questions now or later, please contact **Mike Wentink**, DSN 767-8003.

### The Village People, the YMCA and DOD

Some concern has been expressed because of a Memorandum of Understanding (MOU) between DOD and the Army Services YMCA which was signed by the Secretary of Defense and dated 11 April 1984. Aspects of the MOU conflict with the Joint Ethics Regulation (JER). Questions have been asked as to what rules apply, and does the MOU take precedence. The answer is that the MOU remains in effect, but the JER controls. That was made clear in the Secretary's Memorandum dated 8 May 1997, subject: DoD Support of the Armed Services YMCA. POC is **Mike Wentink**, AMCCC, DSN 767-8003.

### Welcome Mike Wentink

AMC is pleased to have Mike Wentink join AMCCC as Ethics Team Leader after several successful years of practice with the DA Standards of Conduct Office.

# Faces In The Firm

## Hail & Farewell!

### Arriving

HQ AMC

**Major Mike Stump** has been with the General Law Division long enough to bring in bagels to celebrate an anniversary - 1 month. He is a member of the Environmental Law Team.

AMCOM

The following personnel from ATCOM have already signed in at Huntsville: **Jeff Augustin, Chris Barrett, Bruce Bartholomew, Charlie Blair, CPT Scott Gardiner, Bruce Jones, Tina Pixler, Larry Runnels, Brian Toland, Tony Vollers**, all to the Acquisition Law Division, **CPT Chris Wood**, Office of Staff Judge Advocate, and **Suzanne B. Sammons**, General Law/IP Law Division.

CECOM

**Major Marvin Gibbs** joined CECOM in June from the Contract Appeals Division.

STRICOM

**Michael Lassman** has joined the legal office as the Command's General Law Counsel.

TECOM

Welcome to **Dick Wakeling** who transferred from Letterkenny.

### Departing

HQ AMC

**CPT Joe Edgell** will report to Ft. Stewart in late August to become a Trial Defense Service defense counsel. Joe has made very significant contributions — he will leave his mark and will be greatly missed.

CECOM

**Major Margaret Talbot-Bedard** has PCS'd to attend to Command and General Staff College.

IOC

**Dick Wakeling** has left Letterkenny to accept a position at HQ TECOM, Aberdeen Proving Ground.

TACOM

We wish **Michael Lassman** good luck in his new job for the enemy, STRICOM.

### Promotions

**Ms. Mary Ernat**, IOC Plans and Concepts Analyst, has received a promotion. Ms. Ernat has worked in the Office of Counsel for over two years now. Thanks for the wonderful support!

### Awards

HQ AMC

**Mike Wentink** received the Superior Civilian Service Award and the Achievement Medal for Civilian Service for his work at DAJA

### Births

CECOM

Congratulations to **CPT(P) Brian Godard** and his wife Suzanne. They are now the proud parents of a baby boy. Alexander Joseph was born on June 2 weighing 7 lbs., 5 oz. and 20 inches long. Mother and son are doing fine.

IOC

**John Rock**, IOC Environmental/Safety Law, is aka: Grandpa John! Sara (Grandpa John and Grandma Betty's daughter) and Brian Brahm celebrated the birth of their first child, Anna Christine, in June. We've only just seen pictures - she's beautiful!

...Letter to the Editor continued

1124 does not allow such awards to military members.

It seems clearly that some review should be made concerning the gainsharing program. How is that GSA can do it, yet we in DA cannot? Is there a legal interpretation DA could adopt to allow such a program? And is the interest of maintaining uniformity between civilians and military all that important - since the Awards Act is now used to justify awards to civilians that military cannot receive? The goal of reducing government travel costs seems important enough to justify the effort needed to resolve these issues.

Teresa Watmore  
TACOM Legal Office